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IN THE

Supreme Court of the United States

OCTOBER TERM, 1954

No. 307

DRAPER & COMPANY, INCORPORATED,
Petitioner,

v.

COMMODITY CREDIT CORPORATION.

PETITION FOR WRIT OF CERTIORARI

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COMMODITY CREDIT CORPORATION.

PETITION FOR WRIT OF CERTIORARI

Draper & Company, Incorporated, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the First Circuit in the above entitled cause.

Opinions of the Courts Below

The opinion of the District Court for the District of Massachusetts is reported at 113 F. S. 796. The opinions of the Court of Appeals for the First Circuit are reported at 213 F. 2nd 36, 43. The decision of the Court of Appeals is by a majority of the Court, Judge Woodbury dissenting "for the reasons stated in the opinion of the District Court." (R. 229). The opinion of the District Court appears in the copies of the record (printed for the use of the Court below at page 202). A copy of the opinion of the Court of Appeals is appended to the petition.

Jurisdiction

The judgment of the Court of Appeals was entered on May 6, 1954 (R. 230). A petition for rehearing filed on May 20, 1954, was denied on June 14, 1954 (R. 233). Jurisdiction of this Court to issue the writ applied for is invoked under 28 U. S. C. Sec. 1254 (1).

Questions Presented

The questions which this Court is asked to review involve the power of the Court of Appeals to substitute its finding of fact for that of the trial court sitting without a jury.

If the phrase "in bond", as used in a contract between the parties, was so ambiguous that resort to evidence outside the contract was required to ascertain its meaning, was the interpretation placed upon it by the trial court a finding of fact, which should not be set aside unless clearly erroneous?

If, as the Court of Appeals conceded, strong arguments were presented in support of the interpretation adopted by the trial court, and that interpretation was consistent with usage in the trade and statutes and regulations and was supported by oral evidence, may the Court of Appeals place another construction upon the words on the basis of other evidence which seems to such Court more persuasive?

Was the conclusion of the trial court that the alleged breach of the petitioner's contract with the respondent, if such there was, was not material enough to excuse performance by the respondent, a finding of fact, which should not be set aside unless clearly erroneous?

The Statutes Involved

Commodity Credit Corporation Charter Act. 62 Stat. 1070, as amended by 63 Stat. 154, 15 U. S. C Sec. 714

Tariff Act of 1930, paragraph 1101, as amended by Section 33 of the Customs Administrative Act of 1938, 52 Stat. 1090, 19 U. S. C. Sec. 1001, par. 1101.

The pertinent text is set forth in an appendix to the petition.

Statemcnt of the Case

The petitioner was the plaintiff and the respondent was the defendant in an action for damages commenced in the District Court of the United States for the District of Massachusetts. The damages sought were for breach of contracts to accept and pay for wool duly tendered by the plaintiff.

The jurisdiction of the District Court was based on the provisions of Section 4(c) of the Commodity Credit Corporation Charter Act, 15 U. S. C. Sec. 714 b(c).

The sole defense to the suit was that the plaintiff had not fully performed its contracts in that the wool was not "in bond" when tendered. The defendant also counterclaimed for liquidated damages. The District Court determined that the wool was "in bond" and entered judgment for the plaintiff.

The case was tried in the District Court upon stipulated facts and additional oral and documentary evidence. Briefly summarized the evidence established the facts hereinafter set forth.

About December 6, 1950, the defendant issued its Public Announcement LS-262 stating its intention to purchase

about 30,000,000 pounds of foreign wools (R. 203). The announcement provided, *inter alia:*

> "Wool offered for sale to the Commodity Credit Corporation under this announcement must meet the specifications as set out in Schedule A attached hereto as provided in paragraph 3 hereof, and must not have had United States Custom's duties paid thereon" (R. 203).
>
> * * * * *
>
> "2. *Eligible Wool.* Wool eligible for sale to Commodity Credit Corporation shall be wool offered to Commodity Credit Corporation for delivery in bond in the warehouse in the continental United States designated by the vendor in the offer of sale. *However, unless otherwise announced, only wool offered for delivery at the Boston Army Base, Boston, Massachusetts will be considered"* (emphasis ours) (R. 204).

The Boston Army Base was not then a bonded warehouse (R. 210).

On December 18, 1950, the plaintiff sent to the defendant a telegraphic offer reading as follows (Ex. 5, R. 38):

> "Undersigned offers to CCC, Subject to Terms and Conditions of Announcement LS-262 Ninety Eight Thousand Greasy Pounds of Wool Item 234 at One Dollar Eighty Seven Cents per Pound clean Basis, In Bond, to be delivered in Boston Army Base, Boston, not later than March fifteenth, 1951, estimated total value One Hundred Eighteen Thousand Dollars".

This offer and two other like offers differing only in the price or quantities mentioned were accepted by the defendant (R. 205).

It is to be noted that the telegraphic offers were not "for delivery in bond in the warehouse" but "for delivery at the Boston Army Base", and that the words "In Bond" in the telegraphic offers modify the price quoted.

The plaintiff bought wool in Argentina, imported it into the United States, and tendered physical delivery of it to the defendant at the Boston Army Base in April, 1951, within the delivery period as extended by the defendant (R. 205). The duties on the wool had not been paid and the wool was then entered for warehouse under plaintiff's General Term Bond (R. 206). The defendant rejected all except one hundred bales as not within the description of Item 234, but later extended the time for delivery to September 30, 1951, to enable the plaintiff to replace the balance of the wool (R. 206). 178 bales which were in a customs bonded warehouse and were purchased by the plaintiff, were delivered and accepted in July, 1951 (R. 206). Another 237 bales, weighing 124,727 pounds, a quantity enough to complete performance of the contracts by the plaintiff, were tendered on September 7, 1951, but the tender was refused (R. 207). The only question in the case was whether the defendant was justified in refusing to accept these 237 bales.

The 237 bales were fully up to the physical specifications of the contracts, and United States customs duties had not been paid thereon, although the plaintiff was contingently liable for the duties under its General Term Bond (R. 207). It is the history rather than the intrinsic character of this wool which prompted the defendant's refusal to accept it. The sole reason given was that at the time of the tender the wool was no longer "in bond" (R. 207).

After the defendant's rejection of 300 bales in April, 1951, but before the extension of the time of delivery to September 30, 1951, the plaintiff sold 126 bales of those rejected to a carpet manufacturer, and these bales were given conditionally free entry under the provisions of paragraph 1101(b) of the Tariff Act of 1930 (R. 206). The

provisions of that paragraph, which appear in the appendix, permit wool to be entered conditionally free of duty for use in the manufacture of carpets and certain other articles, under bond to pay the duties if the wool is diverted to some other use. Thereafter, the plaintiff learned that the defendant had permitted others to regrade wool previously rejected, so as to make it conform to the physical specifications of their contracts, and it repurchased the 126 bales, together with 23 other bales which it had imported and sold to the carpet manufacturer and which had been given conditionally free entry under said paragraph 1101 (b) (R. 206, 212). It then proceeded to regrade the 149 bales repurchased, together with five other bales which it had imported and entered for warehouse, and produced 261 bales, of which it tendered the 237 in question (R. 206).

All deliveries made by the plaintiffs and accepted by the defendant were physical deliveries, not deliveries by warehouse receipts, that is, they were deliveries "in store at the Boston Army Base" rather than deliveries "in bond in the warehouse" (R. 207).

At the trial the plaintiff contended that, since the contracts required physical deliveries at the Boston Army Base, i. e., out of customs custody, it was under no duty to make delivery of wool "in bond", if in fact those words meant "in customs custody". It also contended that the words "in bond" did not mean "in customs custody". The District Judge did not pass on the first contention because he found that the words "in bond" did not mean "in customs custody" (R. 209), and concluded that wool given conditionally free entry under paragraph 1101 (b) of the Tariff Act of 1930 was "in bond" (R. 212).

The Court of Appeals assumed that deliveries required were of wool "in bond", and said in the majority opinion (R. 222):

> "The fundamental question presented for our decision on the above facts is whether or not the 237 bales of wool tendered by the plaintiff and rejected by the defendant on September 7, 1951, were 'in bond' as required by paragraph 2 of Announcement LS-262, which was specifically made part of the contracts entered into by the parties.
>
> "The plaintiff contends that wool 'in bond' means wool upon which customs duties were not paid but were secured by bond * * * The defendant, on the other hand, argues that the phrase 'in bond' was intended by the parties to mean wool which has not been released from the custody of the Customs authorities and has not therefore entered the domestic commerce of the United States" (R. 222).

It is to be noted that the Court of Appeals treated the question of the meaning of the words "in bond" as one for its decision, unaffected by the provisions of Rule 52 (a) of the Federal Rules of Civil Procedure that:

> "Findings of fact shall not be set aside unless clearly erroneous and due regard shall be given to the opportunity of the trial court to judge of the credibility of witnesses".

There is no suggestion in the majority opinion that the finding of the District Court as to the meaning of the words was plainly erroneous. Indeed, it is said (R. 223):

> "The plaintiff has presented strong arguments in support of its interpretation of the phrase 'in bond'. It contends that the phrase is generally used to qualify a quoted price, rather than as a reference to the status of physical custody over imported goods maintained by the Customs authorities before release for consumption. To substantiate its contention the plaintiff introduced in evidence exhibits of confirmations of sales between it and third parties in which a quoted price is

> followed by the letters 'I.B.' or in 'In Bond'. Furthermore in the contract between the defendant and the Quartermaster General the words 'in bond' are immediately followed by the words 'without payment of customs duties'. In addition, the plaintiff cites instances in the customs statutes, regulations, and treasury decisions in which the phrase 'in bond' is not synonymous with 'in customs custody', see 19 U. S. A. 1313 (e). 1563(a); 19 C.F.R. 18.1(a); or in which 'in bond' is the antonym of 'duty paid'. See 19 U.S.C.A. 1554".

Certainly, it was permissible to use the words "in bond" as describing wool entered conditionally free of duty under the provisions of paragraph 1101(b) of the Tariff Act of 1930, though therein described as "under bond." Such wool has been described as "in bond" in Treasury Decisions; see T.D. 46515 (9), 64 Treasury Decisions, page 38; U. S. Treasury Department, Digest of Customs and Related Laws and of Decisions Thereunder, 1935, Vol. 1, pages 586-587. Congress has used the words "in bond" as describing salt entered conditionally free of duty for use in curing fish under the provisions of Section 313 (e) of the Tariff Act of 1930, 19 U.S.C.A. Sec. 1313 (e). There are many other instances in the statutes and Customs Regulations, not referred to in the majority opinion, in which the words "in bond" are used as describing imported goods not in customs custody, but we presume that we need not here labor the point, since the opinion intimates that normally "in bond" and "in customs custody" are not synonymous. It is said (R. 223):

> "We do not believe, however, that the usage of the phrase in plaintiff's dealings with third persons and its usage in customs statutes and regulations is as persuasive in revealing what the parties meant as (1) the evidence in the record which discloses what actually transpired between these two parties in preparing

> and formulating their contracts and (2) provisions in the contracts which indicate what the parties intended the phrase 'in bond' to mean."

Perhaps it is enough to reiterate that the majority opinion does not conclude that the trial court's findings were clearly erroneous. Indeed, since the four judges who considered the evidence divided equally interpreting it, such a conclusion might seem difficult to reach and maintain. But some brief comment should be made with respect to some of the writings outside the contract, which the majority opinion considered "persuasive", although not shown to have been brought to the plaintiff's attention, and brief reference made to parts of the oral evidence not mentioned in the opinion, to which the trial Judge might have given weight.

The majority opinion relies principally upon the language of certain recommendations to the defendant with respect to the latter's wool purchase program, submitted by the Boston Wool Trade Association through its Washington Counsel on November 6, 1950. The recommendations bore the typed signatures: "Executive Committee, Public Relations Committee, Committee for Emergency Cooperation, Boston Wool Trade Association" (R. 20). It appeared from oral evidence that the President of the plaintiff was the Chairman of the Public Relations Committee, and that at the time of the trial he was familiar with the recommendations. But he denied that he was "Chairman of the Committee that participated in drafting those recommendations" (R. 124), and testified that "I didn't submit anything that I know of" (R. 125). The evidence was clearly insufficient to affect the plaintiff with knowledge of the specific language of the recommendations before the contracts were made.

The language of the recommendations upon which the majority opinion relied was, we think, more ambiguous than any language in the contract. It is found under the heading "Eligibilities of Offerings" (Exh. 2, R. 31):

> "(b) All wool that has not entered the commerce of the United States, namely wool in-bond, is eligible regardless of whether it was purchased or had arrived prior to date of sale to C.C.C."

The majority opinion treats the words "all wool that has not entered the commerce of the United States" as synonymous with "all wool in customs custody". This unusual interpretation is in conflict with a decision of this Court construing the words "enter or introduce • • • into the commerce of the United States" and holding that when goods "were unloaded and placed in general order, they were actually introduced into that commerce".

United States v. 25 Packages of Panama Hats, 231 U. S. 358, 362.

Wool entered for warehouse and stored in a bonded warehouse may be and is sold and resold in the trade without removal from the warehouse, deliveries being effected by transfers of warehouse receipts (R. 207). Such wool has, of course, entered the commerce of the United States, even though it remains in customs custody. (See *Mulfort v. Smith*, 307 U. S. 38, 47). If the words "all wool that has not entered the commerce of the United States" are to be given a special meaning, they might more reasonably have been construed as meaning "all wool upon which customs duties have not been paid but are secured by bond".

The opinion relies also upon certain language in the contract between the defendant and the Quartermaster General dated December 5, 1950 (Exh. 3, R. 34). There was no evidence that the plaintiff saw this contract before its

own contracts were made, and it should not have been affected by its language. Moreover, the provisions quoted are mere recitals that the Quartermaster General would buy from the defendant "wool produced outside the United States" and that the defendant should "inspect the wool at the port of entry or in the designated bonded warehouses promptly after arrival"; they throw no light on the words "in bond".

The opinion quotes from parts of the oral testimony of the plaintiff's President, but ignores explicit statements by him which the trial court might have accepted. For instance, on cross examination by Counsel for the defendant (R. 130-131):

> "Q. May I also bring your attention to your direct testimony with respect to the delivery of wool in September at the Army Warehouse on the Boston Army Base. Would you at that time have stated that the wool that was delivered had been delivered in the same in bond status as the wool that was delivered in April of that year to the Boston Army Base?
> "A. Yes."

And, on re-direct (R. 144):

> "Q. In September, 1951, you had not paid the duty on this wool which you tendered at that time?
> "A. That is right.
> "Q. Have you paid it since that time?
> "A. No. * * * It is still in bond as far as we know."

The plaintiff also contended at the trial that, even if there had been a technical failure of performance on its part, the breach was not material enough to justify the defendant's refusal to accept the wool, particularly in view of the fact that plaintiff offered to pay any duties which might be assessed on the importation of the wool (R. 207). The trial court so concluded, saying:

> "This wool is for the most part regraded from wool which was specifically purchased abroad and imported by plaintiff for the purpose of supplying wool to defendant under its purchasing program. It is wool which except for that program might never have been imported. While it may have been temporarily diverted to a proposed domestic use while plaintiff was not aware that it could be regraded, plaintiff promptly recovered it, regraded it, and offered it to the defendant. It was exactly the type of wool which defendant's purchasing program was intended to bring in and should have been accepted" (R. 212).

The majority opinion of the Court of Appeals states (R. 227):

> "We do not agree. As we have already stated, the wool tendered by the plaintiff had entered the domestic commerce of the United States. The purpose of the government's purchasing program was only to purchase wool directly from foreign sources or wool which had remained in Customs custody. The program did not contemplate purchasing wool which at some time or other had come from a foreign source and subsequently had entered the domestic commerce of the United States".

What the purpose of the Government's purchasing program may have been is not clear from the record. It does not appear from the statutory authority, Supplemental Appropriations Act of 1951 (P. L. 843, 81st Congress, 64 Stat. 1044), which provided in Chapter X, *subtitle* "Quartermaster Corps", in pertinent part as follows (R. 203):

> "* * * Contracts may be made for the purchase of 100,000,000 pounds of raw wool, woolen garments, fabrics and knitting yarns for use of all the Armed Services".

Even if the purpose of the program was as inferred in the majority opinion, the question whether the deliveries tendered by the petitioner in September 1950 would have

fairly and adequately tended to accomplish that purpose called for a conclusion of fact. See *Restatement of the Law: Contracts*, Sec. 275.

The Reasons Relied on for the Writ.

The majority opinion clearly violates the provisions of Rule 52(a) of the Federal Rules of Civil Procedure, quoted above.

If resort to facts outside the contract itself was required to ascertain the meaning of the words "in bond", the determination of such meaning was a finding of fact.

American Stevedores v. Porello, 330 U. S. 446, 458.

> "As it stands the clause is ambiguous. Evidence might well have been taken as to the intention of the parties, but was not * * * From the record it is not clear whether the District Court made any finding as to the meaning of the contract. We believe its interpretation should be left in the first instance to that court, which shall have the benefit of such evidence as there is upon the intention of the parties."

The trial court's conclusion that the breach, if any, was not so material as to excuse performance by the respondent was also a finding of fact.

Graver Tank Co. v. Linde Air Prod. Co., 339 U. S. 605, 609.

> "Like any other issue of fact, final determination requires a balancing of credibility, persuasiveness and weight of evidence. It is to be decided by the trial court and that court's decision, under general principles of appellate review should not be disturbed unless clearly erroneous."

In that case this Court held that a determination of "equivalence" in a patent case was a finding of fact, not to be set aside unless clearly erroneous.

If the Court of Appeals decided that the trial court's conclusions as to the meaning of the words "in bond" and as to the materiality of any breach were not findings of fact subject to Rule 52(a), it has decided a federal question in a way in conflict with applicable decisions of this Court.

If, on the other hand, the Court of Appeals disregarded the provisions of Rule 52(a), it has so far departed from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's power of supervision.

United States v. National Association, R. E. B., 339 U. S. 485, 495.

> "It is not enough that we might give the facts another construction, resolve the ambiguities differently, and find a more sinister cast to actions which the District Court apparently deemed innocent * * * We are not given those choices, because our mandate is not to set aside findings of fact 'unless clearly erroneous' ".

Compare *National L. R. B. v. Waterman S. S. Corp.*, 309 U. S. 206, 208.

Under what circumstances a Court of Appeals has power to substitute its findings for those of the trial court sitting without a jury, is an important question of federal law (see the discussion by Judge Frank in *Orvis v. Higgins*, 180 F. 2nd 537, C. A.-2). If it has not been settled by this Court, it should be. This Court has said in *United States v. Yellow Cab Co.*, 338 U. S. 338, 342, that

> "a choice between two permissible views of the weight of evidence is not 'clearly erroneous' ".

In *Tennessee Coal Iron & R. Co. v. Muscoda Local No. 123*, 137 F. 2nd 176, 180 (CCA.5), affirmed by this Court in 321 U. S. 590, the Court of Appeals said:

> "Even when there is no dispute about the facts, if different reasonable inferences may fairly be drawn from the evidence, an appellate court is forbidden to disturb the findings based on such inferences unless they are clearly erroneous".

If doubt remains as to the power of a Court of Appeals to revise the final determinations of a trial judge, it should be resolved by this Court. It must be of moment in the administration of justice in the federal courts that the line between the work to be done by trial courts and by courts of appeal be clearly marked. If an appeal may succeed because two judges in the Court of Appeals are persuaded that words of doubtful meaning should be given another meaning than that, not plainly erroneous, placed upon them by the trial court, the appellate jurisdiction will surely be expanded.

A decision that, although "strong arguments" supported the conclusion reached by the trial judge, the evidence upon which they were based was not "as persuasive" as other facts, should not be left as a precedent.

Wherefore, it is respectfully submitted that this petition should be granted.

DRAPER & COMPANY, Incorporated,

By its attorney,

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Appendix "A"

UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

No. 4782.

COMMODITY CREDIT CORPORATION,
DEFENDANT, APPELLANT,

v.

DRAPER & COMPANY, INCORPORATED,
PLAINTIFF, APPELLEE.

APPEAL FROM JUDGMENT OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MASSACHUSETTS

[113 F. Supp. 796]

Before MAGRUDER, *Chief Judge*, and WOODBURY and HARTIGAN, *Circuit Judges*.

Edward H. Hickey, Attorney, Department of Justice, with whom *Warren E. Burger*, Assistant Attorney General *Anthony Julian*, United States Attorney, and *Paul A. Sweeney*, Attorney, Department of Justice, were on brief, for appellant.

Edward C. Park, with whom *Charles C. Worth* and *Withington, Cross, Park & McGann* were on brief, for appellee.

OPINION OF THE COURT.

May 6, 1954.

HARTIGAN, *Circuit Judge*. The plaintiff Draper & Company, Inc., instituted this action against the defendant Com-

modity Credit Corporation, in the United States District Court for the District of Massachusetts. The complaint alleges that the parties had entered into certain contracts and that the plaintiff has duly performed all of the conditions required by the contracts but that the defendant wrongfully refused to accept delivery of and pay for shipments of wool tendered by the plaintiff. In its answer the defendant alleges that it refused to accept and pay for the wool tendered to it because the plaintiff's voluntary acts had rendered the wool ineligible for sale or delivery to the defendant under the terms of the contracts. The defendant also filed an amended counterclaim for liquidated damages specified in the contracts. The district court held that the wool tendered by the plaintiff met the conditions imposed by the contracts and entered judgment on July 13, 1953 for the plaintiff for the sum of $76,831.04 with interest thereon from September 30, 1951 to July 9, 1953, in the amount of $8,182.52 and costs and dismissed the defendant's counterclaim.

The following facts were either stipulated by the parties or were unchallenged findings made by the district court.

1. Plaintiff, Draper & Company, Inc., is a corporation organized under the laws of the Commonwealth of Massachusetts engaged in the buying and selling of domestic and foreign wools.

2. Defendant, Commodity Credit Corporation, is a federal corporation created by the Commodity Credit Corporation Charter Act (62 Stat. 1070, 15 U. S. C., 714).

3. On September 27, 1950, Congress enacted the Supplemental Appropriations Act of 1951 (P. L. 843, 81st Congress, 64 Stat. 1044) which provided in Chapter X, subtitle "Quartermaster Corps", in pertinent part as follows:

"* * * contracts may be made for the purchase of 100,000,000 pounds of raw wool, woolen garments,

fabrics and knitting yarns for use of all the Armed Services."

4. On or about October 25, 1950, the defendant sent to the various Wool Trade Associations a telegram, * * * inviting each association to send a representative to the United States Department of Agriculture in Washington, D. C., to participate in a discussion of a procurement program under which defendant would acquire certain foreign wools for the Quartermaster General of the Department of the Army.

5. In response to defendant's telegram, on or about November 7, 1950, the Boston Wool Trade Association, through its Washington counsel submitted "Recommendations for Purchase Agreement to Cover Commodity Credit Corporation Wool Purchases" dated November 6, 1950, * * *.

6. The Committee of the Boston Wool Trade Association which prepared such Recommendations was composed among others, of the Public Relations Committee the Chairman of which was Mr. Malcolm Green, President of plaintiff corporation.

7. Pursuant to P. L. 843, the Quartermaster General, Department of the Army, on December 5, 1950, entered into a Wool Purchase Contract with the defendant, Commodity Credit Corporation, authorizing said defendant to acquire and sell to the Quartermaster General 30,000,000 pounds (minus the tolerance of 5%) clean basis of wool produced outside the United States. Said contract further provided that delivery to Commodity Credit Corporation under its purchase contract would be in bond without payment of custom duties.

8. In accordance with its contract with the Quartermaster General, the defendant on or about December 6, 1950, issued Public Announcement LS-262 stating its intention to purchase about 30,000,000 pounds of wool and setting forth the terms and conditions upon which offers to sell could be made.

9. Announcement LS-262 contained the following provisions:

"The Commodity Credit Corporation hereby announces its intention to purchase wool in a quantity of approximately 30,000,000 pounds clean basis.

Wool offered for sale to the Commodity Credit Corporation under this announcement must meet the specifications as set out in schedule A attached hereto, as provided in paragraph 3 hereof, and must not have had United States Customs' duties paid thereon. Such wool is to be offered for sale to Commodity Credit Corporation on or before June 30, 1951. Commodity Credit Corporation reserves the right to reject any or all offers and to increase or decrease the quantity of wool with respect to which it invites offers of sale. Such wool will be purchased subject to the following terms and conditions:

"2. *Eligible Wool.* Wool eligible for sale to Commodity Credit Corporation shall be wool offered to Commodity Credit Corporation for delivery in bond in the warehouse in the continental United States, designated by the vendor in the offer of sale. However, unless otherwise announced, only wool offered for delivery in store at the Boston Army Base, Boston, Massachusetts, will be considered. * * *

"3. *Specifications.* Only the types and grades of wool shown in Schedule A attached hereto will be considered for acceptance under this announcement."

Schedule A attached to the announcement listed by numbered items the types and grades of wool which the defendant considered purchasing. Item 234 was described as follows:

"Buenos Aires 5—S (40-s) Super Fleeces, fully skirted, Practically free 5½"—8"."

10. The terms and conditions of the announcement were specifically made part of the contracts entered into by the plaintiff and the defendant and were arrived at after consultation and upon the recommendations of representatives of the wool trade including the president of the plaintiff corporation.

11. On December 18, 1950, the plaintiff made telegraphic offers, in the form prescribed by the announcement and confirmed as therein provided, to sell to the defendant ninety-eight thousand pounds of wool, item 234, at a dollar and eighty-eight cents per pound, clean

basis, in bond, and an additional ninety-eight thousand pounds of wool, item 234, at a dollar and eighty-seven cents per pound, clean basis, in bond. Both offers were for delivery at Boston Army Base, Boston, not later than March fifteenth, 1951. On December 20, 1950, the defendant sent the plaintiff a telegram accepting the offers, and thereafter confirmed the contract in writing. The contract was designated by the defendant by the symbols A1PM (FF) 27042. * * *

12. On December 26, 1950, the plaintiff made a telegraphic offer, in the form prescribed by the announcement and confirmed as therein provided, to sell to the defendant one hundred and ninety-six thousand pounds of wool, item 234, at one dollar and eighty-eight cents per pound, clean basis, in bond, for delivery at Boston Army Base, Boston, not later than March fifteenth, 1951. On December 27, 1950, the defendant sent the plaintiff a telegram accepting the offer, and thereafter confirmed the contract in writing. The contract was designated by the defendant by the symbols A1PM (FF)—27058. * * *

13. Each contract provided that it would be satisfied by delivery of the contract quantity within a plus or minus tolerance of 10% in pounds. Each contract further provided for liquidated damages upon plaintiff's failure to deliver wool at the rate of 5% of the contract sales price.

14. On January 2, 1951, The Bureau of Customs, at the request of the Quartermaster General, designated the Boston Army Base a Customs Bonded Warehouse, Class 2, for the purposes of the wool purchase program.

15. At the request of the plaintiff, the contracts were amended, extending the delivery date to April 30, 1951.

16. The plaintiff bought wool in Argentina, imported it into the United States, and tendered physical delivery of the same to the defendant at the Boston Army Base in April of 1951. The duties on this wool had not been paid, and the wool was entered for warehouse under plaintiff's General Term Bond.

The defendant accepted only one hundred bales, or about 98,000 pounds, under the contract made on December 20, 1950, and rejected the balance as not in conformity with the description of item 234.

17. In May, 1951, the plaintiff sold 126 of the rejected bales to Bigelow-Sanford Carpet Company. These bales were withdrawn from warehouse conditionally free of duty under par 1101, Tariff Act of 1930, and responsibility for any duties was transferred to Bigelow-Sanford under its bond.

18. In June, 1951, plaintiff wrote the defendant asking that the delivery dates on the remaining two contracts be extended in order that the wool previously rejected could be replaced by the plaintiff. The defendant agreed to and extended the time for performance under the contracts to September 30, 1951.

19. The plaintiff purchased from the Bigelow-Sanford Carpet Company approximately 178 bales of Item 234, which were in a customs bonded warehouse and under the custody of the United States Customs Bureau. This wool, approximately 169,414 pounds in the grease, tendered for delivery by plaintiff in July was accepted by the defendant in part performance of the contract of December 27, 1950, thus leaving a balance of approximately 126,586 pounds to be delivered in completion of the contracts.

20. The plaintiff also repurchased the 126 bales of wool, previously rejected by the defendant, from Bigelow plus twenty-three other bales which plaintiff had imported from Argentina in April, 1951, and had sold to Bigelow for carpet manufacture. The additional twenty-three bales had been entered conditionally free of duty under bond.

21. The plaintiff then proceeded to regrade the 149 bales of wool so repurchased from Bigelow together with five other bales of wool which plaintiff had imported and entered for warehouse in February and April, 1951.

22. As a result of the regrading, the plaintiff obtained 261 bales of wool of which it set aside 237 bales for tender to the defendant under its contracts. These 237 bales had a net weight of 124,727 pounds.

23. On September 7, 1951, the plaintiff tendered delivery of the 237 bales of regraded wool to the defendant at the Boston Army Base, but the defendant refused to accept them.

24. On September 7, 1951, the duties on the 237 bales had not been paid but the plaintiff was contingently liable therefor under its General Term Bond.

25. The 237 bales were fully up to the physical specifications of the contracts, and an inspection certificate so stating was signed but not issued to the plaintiff. The sole reason given by defendant for its refusal to accept the wool was that defendant considered the wool as ineligible under the contract since it had been regraded from wool which had been given a conditional free entry under a "carpet bond" and hence was regarded by defendant as not being wool "in bond" within the terms of the contract.

The fundamental question presented for our decision on the above facts is whether or not the 237 bales of wool tendered by the plaintiff and rejected by the defendant on September 7, 1951 were "in bond" as required by paragraph 2 of Announcement LS-262, which was specifically made part of the contracts entered into by the parties.[1]

The plaintiff contends that wool "in bond" means wool upon which custom duties were not paid but were secured by bond. Since the duties on the wool tendered by the plaintiff had not been paid but were secured under the plaintiff's General Term Bond, the plaintiff asserts that the defendant was not justified in refusing to take delivery of the tendered wool. The defendant, on the other hand, argues that the phrase "in bond" was intended by the parties to mean wool which has not been released from the custody of the Customs authorities and has not therefore entered the domestic commerce of the United States. It argues that, since the rejected wool had been released by

[1] See Findings Nos. 9 and 10, *supra*.

the Customs authorities under a "carpet bond" and thus had entered the domestic commerce of the United States, it was justified in refusing to take delivery of the wool.

The plaintiff has presented strong arguments in support of its interpretation of the phrase "in bond." It contends that the phrase is generally used to qualify a quoted price, rather than as a reference to the status of physical custody over imported goods maintained by the Customs authorities before release for consumption. To substantiate its contention, the plaintiff introduced in evidence exhibits of confirmations of sales between it and third parties in which a quoted price is followed by the letters "I. B." or "In Bond." Furthermore in the contract between the defendant and the Quartermaster General the words "in bond" are immediately followed by the words "without payment of customs duties." In addition, the plaintiff cites instances in the customs statutes, regulations, and treasury decisions in which the phrase "in bond" is not synonymous with "in customs custody," see 19 U. S. C. A. §§ 1313(e), 1563(a); 19 C. F. R. § 18.1(a); or in which "in bond" is the antonym of "duty paid." See 19 U. S. C. A. § 1554.

We do not believe, however, that the usage of the phrase in plaintiff's dealings with third persons and its usage in customs statutes and regulations is as persuasive in revealing what the parties meant as (1) the evidence in the record which discloses what actually transpired between these two parties in preparing and formulating their contracts and (2) provisions in the contracts which indicate what the parties intended the phrase "in bond" to mean.

Mr. Green, president of the plaintiff, testified that he participated in discussions with the defendant in connection with its wool procurement program and that he assisted in drafting Announcement LS-262. He further testified that

following these conferences a memorandum entitled "Recommendations For Purchase Agreement To Cover C. C. C. Wool Purchases" was sent to the defendant by the Boston Wool Trade Association. One of the committees of the Boston Wool Trade Association which signed these recommendations was the Public Relations Committee of which Green was chairman. Mr. L. Thornton Davis, who accepted the plaintiff's offers to sell the wool designated in the December wires on behalf of the defendant, testified that he participated in the conferences and meetings with the representatives of the wool trade and in the drafting of Announcement LS-262. The district court found that the terms and conditions of the announcement were arrived at after consultation and upon the recommendations of representatives of the wool trade including the president of the plaintiff corporation. Paragraph 2 of the recommendations states:

> "2. Eligibility of Offerings.
>
> "(a) Wool must have originated outside the United States, Canada, Mexico, Iceland, Alaska.
>
> "(b) All wool that has not entered the commerce of the United States, namely wool in-bond, is eligible regardless of whether it was purchased or had arrived prior to date of sale to C. C. C."

The recommendations thus contain a definition of "in bond" that substantiate the defendant's interpretation of these words. Admittedly the recommendations were not incorporated into the contracts. But, in view of the fact that the terms and conditions of the contracts were arrived at upon the basis of these recommendations, we believe that the definition of the phrase in the recommendations is a strong indication of what the parties intended that phrase to mean in their contracts. And it is clear that the wool tendered by the plaintiff on September 7, 1950, had prior

to that date entered the commerce of the United States. On May 16, 1951, the plaintiff made warehouse withdrawals of this wool conditionally free of duty for the purpose of carpet manufacture. The wool was then sold and delivered to Bigelow-Sanford Carpet Company of New York, N. Y.

Furthermore, the record reveals that the main source of the defendant's wool procurement program was intended by the parties to be foreign wool offered directly to the defendant upon its arrival in this country. The telegram sent by the defendant to the various Wool Trade Associations states: "Commodity Credit Corporation has been requested to undertake the acquisition of certain foreign wools for the Department of the Army. In an effort to develop a program which will not disrupt normal marketing conditions, you are invited to send representatives of your organization interested in foreign wools to participate in a discussion of a procurement program * * *." The contract between the defendant and the Quartermaster General specifies in Paragraph 1 that: "* * *CCC will acquire and sell to The Quartermaster General 30,000,000 pounds (plus or minus a tolerance of five percent) clean basis, of wool produced outside the United States * * *," and in Paragraph 2 that: "* * * CCC will inspect the wool at the port of entry or in the designated bonded warehouses promptly after arrival. * * *" Announcement LS-262 states in Paragraph 11 that: "* * * The vendor shall notify the Area Wool Office, Livestock Branch, 408 Atlantic Avenue, Boston 10, Massachusetts, upon the arrival in the bonded warehouse of wool tendered under this announcement. * * *" Also Paragraph 18 states: "* * * At the time of arrival of shipments of wool under contract to Commodity Credit Corporation a separate declaration must be made to the Customs Bureau for each Item. * * *"

But under the terms of the contracts one type of wool is eligible for sale to the defendant, even though it may not have arrived from a source outside the United States immediately prior to its tender to the defendant. This wool is the so-called "spot wool," as defined in Paragraph 12 of Announcement LS-262.[2] There is no dispute that "spot wool" is in customs custody. Paragraphs 7 and 12 of the announcement contain detailed provisions on the manner in which "spot wool" is to be weighed and how a vendor may request an inspection of it. There are no similar provisions in the contracts, however, for wool that has been released from the custody of the Customs authorities and has entered the domestic commerce of the United States. By explicitly specifying that wool (1) which is stored in a bonded warehouse within certain areas and (2) upon which United States Customs duty has not been paid, we believe the parties have indicated the extent to which wool tendered from non-foreign sources is eligible for sale to the defendant.

Also, the testimony of the plaintiff's president, Mr. Green, clearly indicates that the parties intended "spot wool" to fix the boundary of wool eligible for sale to the defendant from sources within the United States. He testified:

> "* * * This Committee was invited to Washington to work out a program that Congress passed to buy

[2] "12. *Spot wool.* Vendors who propose to offer wool to CCC, under this announcement, that is stored in a bonded warehouse within the Eastern Seaboard Area of the United States at, or north of, Philadelphia, Pennsylvania, and upon which United States Customs duty has not been paid, may request the Area Wool Office, Livestock Branch, Boston, Massachusetts, to make an inspection of the wool prior to offering such wool to CCC. The request for inspection must give full description of the wool, including the item number under which it will be offered to CCC, and must be accompanied by a representative sample. CCC will, when feasible, endeavor to make such inspection and advise the vendor whether or not the wool meets the specifications of the item number under which the wool will be offered to CCC and, if the wool is accepted by CCC, will issue a certificate as provided in paragraph 11 of this announcement."

30,000 (*sic*) pounds of foreign wool to bring in for this country. This Committee was purely invited down there to assist them to line up the types of wools after the Quartermaster had advised them what grades they wanted. They were there to assist them to line up the types of wool, and so forth, and the terms of contract, and so forth, and they started off by wanting everything imported into the country. They wound up by allowing people to sell CCC wool that had been in bond for any amount of years, sitting in the country.

* * *

"Q. What does that mean to you 'wool in bond'?

"A. It is wool in bond, just under the custody of Customs."

The plaintiff contends that even if the contract meant that the wool must remain in Customs custody until delivery, the breach was not material enough to excuse performance by the defendant. It is argued that the wool was for the most part bought and imported by the plaintiff specifically for delivery under the contracts and that, while it may have been temporarily diverted to domestic use because the plaintiff was not aware it could be regraded, the plaintiff promptly recovered it, regraded it, and then offered exactly the type of wool which the defendant's purchasing program intended to be brought into this country.

We do not agree. As we have already stated, the wool tendered by the plaintiff had entered the domestic commerce of the United States. The purpose of the government's purchasing program was only to purchase wool directly from foreign sources or wool which had remained in Customs custody. The program did not contemplate purchasing wool which at some time or other had come from

a foreign source and subsequently had entered the domestic commerce of the United States. In analogous situations the consequences of releasing wool under a "carpet bond" in accordance with the provisions of 19 U.S.C. § 1001, par. 1101(b) are not merely "technical." For example, goods in the custody of Customs may be re-exported without the payment of duties. 19 U.S.C.A. § 1557. If the goods are released by the Customs authorities conditionally free of duties, however, the importer may not later re-export them without the payment of duties. 19 U.S.C.A. § 1558, *Khosrovschahi & Co.* v. *United States*, 39 C.C.P.A., Customs, 40 (1951). Also, there was testimony that it was the established practice of the Customs authorities under the provisions of 19 C.F.R. 10.91(c) to refuse to restore to Customs custody goods which have been withdrawn under a "carpet bond."

With respect to the defendant's amended counterclaim, Paragraph 20 of Announcement LS-262 provides:

> "20. *Liquidated Damages.* The vendor shall pay to CCC, as liquidated damages, and not as a penalty, an amount equal to five (5) percent of the sales price specified in the Offer to Sell, of any wool which the vendor shall fail to deliver to CCC in accordance with an accepted Offer to Sell, unless such failure to deliver is one for which the vendor is excused pursuant to the provisions of paragraphs 4 or 19 of this announcement, and vendor, by submitting an Offer to Sell pursuant to this announcement, agrees that any such unjustified failure of delivery will damage CCC in the amount specified."

The quantity of wool deliverable under the contract designated by the defendant by the symbols A1PM (FF) 27042 was 196,000 pounds. From this figure the plaintiff is per-

mitted to deduct 19,600 pounds under the provisions of paragraph 5 of the Announcement[3] and 98,000 pounds for wool delivered to the defendant in April of 1951.[4] The clean content of the wool rejected was 70%,[5] and thus the clean weight of the wool which the defendant failed to deliver under this contract was 54,880 pounds. Five percent liquidated damages on this quantity of wool at the contract price of $1.88 per pound amounts to $5,158.72. By the same process, the liquidated damages under the contract designated by the defendant by the symbols A1PM (FF) 27058 amounts to $459.68. The defendant, therefore, is entitled to recover $5,618.40 on its amended counterclaim.

The judgment of the district court is vacated and the case is remanded to that court for entry of judgment for the defendant on its amended counterclaim in the amount of $5,618.40.

WOODBURY, *Circuit Judge,* (dissenting). I would affirm the judgment for the reasons stated in the opinion of the District Court.

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[3] "5. *Tolerance.* The contract shall be considered to be satisfied by the delivery of the contract quantity, within a plus or minus tolerance of ten (10) percent in pounds, without regard to shrinkage results."

[4] See Finding No. 16, *supra.*

[5] "6. *Clean Content.* Final settlement shall be based upon the clean content of the wool delivered to Commodity Credit Corporation, as determined by the United States Customs Bureau, whose determinations, subject to the appeals permitted by the regulations of the United States Customs Bureau, shall be final."

Appendix "B"

COMMODITY CREDIT CORPORATION CHARTER ACT PARAGRAPHS (c) AND (g) OF TEXT OF SECTION 3 AS FOUND IN 15 U.S.C. SEC. 714 (b)

GENERAL POWERS OF CORPORATION

The Corporation—

(c) May sue and be sued, but no attachment, injunction, garnishment, or other similar process, mesne or final, shall be issued against the Corporation or its property. The district courts of the United States, including the district courts of any Territory or possession, shall have exclusive original jurisdiction, without regard to the amount in controversy, of all suits brought by or against the Corporation: PROVIDED, That the Corporation may intervene in any court in any suit, action, or proceeding in which it has an interest. Any suit against the Corporation shall be brought in the District of Columbia, or in the district wherein the plaintiff resides or is engaged in business. No suit by or against the Corporation shall be allowed unless (1) it shall have been brought within six years after the right accrued on which suit is brought, or (2) in the event that the person bringing such suit shall have been under legal disability or beyond the seas at the time the right accrued, the suit shall have been brought within three years after the disability shall have ceased or within six years after the right accrued on which suit is brought, whichever period is longer. The defendant in any suit by or against the Corporation may plead, by way of set-off or counterclaim, any cause of action, whether arising out of the same transaction or not, which would otherwise be barred by

such limitation if the claim upon which the defendant's cause of action is based had not been barred prior to the date that the plaintiff's cause of action arose: PROVIDED, That the defendant shall not be awarded a judgment on any such set-off or counterclaim for any amount in excess of the amount of the plaintiff's claim established in the suit. All suits against the Corporation shall be tried by the court without a jury. Notwithstanding any other provision of sections 714-714o of this title, the Federal Tort Claims Act shall be applicable to the Corporation. Any suit by or against the United States as the real party in interest based upon any claim by or against the Corporation shall be subject to the provisions of the subsection (c) of this section to the same extent as though such suit were by or against the Corporation, except that (1) any such suit against the United States based upon any claim of the type enumerated in section 1491 of Title 28, may be brought in the United States Court of Claims, and (2) no such suit against the United States may be brought in a district court unless such suit might, without regard to the provisions of sections 714-714o of this title, be brought in such court.

(g) May enter into and carry out such contracts or agreements as are necessary in the conduct of its business. State and local regulatory laws or rules shall not be applicable with respect to contracts or agreements of the Corporation or the parties thereto to the extent that such contracts or agreements provide that such laws or rules shall not be applicable, or to the extent that such laws or rules are inconsistent with such contracts or agreements.

Appendix "C"

TARIFF ACT OF 1930

Par. 1101. (a) Wools: Donskoi, Smyrna, Cordova, Valparaiso, Ecuadorean, Syrian, Aleppo, Georgian, Turkestan, Arabian, Bagdad, Persian, Sistan, East Indian, Thibetan, Chinese, Manchurian, Mongolian, Egyptian, Sudan, Cyprus, Sardinian, Pyrenean, Oporto, Iceland, Scotch Blackface, Black Spanish, Kerry, Haslock, and Welsh Mountain; similar wools without merino or English blood; all other wools of whatever blood or origin not finer than 40s; and hair of the camel; all the foregoing, in the grease or washed, 24 cents per pound of clean content; scoured, 27 cents per pound of clean content; on the skin, 22 cents per pound of clean content; sorted, or matchings, if not scoured, 25 cents per pound of clean content: PROVIDED, That a tolerance of not more than 10 per centum of wools not finer than 44s may be allowed in each bale or package of wools imported as not finer than 40s.

(b) Any of the foregoing may be entered or withdrawn from warehouse without the payment of duty by a manufacturer, processor, or dealer upon the filing of a bond to insure that any wool or hair entered or withdrawn thereunder shall be used only in the manufacture of press cloth, camel's hair belting, knit or felt boots, heavy fulled lumbermen's socks, rugs, carpets, or any other floor coverings. A manufacturer, processor, or dealer may be relieved of liability under his bond with respect to any wool or hair so entered or withdrawn which is transferred in its imported or any other form to another manufacture, processor, or dealer who has filed a bond to insure that the merchandise so transferred shall be used only in the manufac-

ture of the above-enumerated articles. If any wool or hair so entered, withdrawn, or transferred under bond is used or transferred for use in its imported or any other form in any manner otherwise than in the manufacture of the articles enumerated above, there shall be levied, collected, and paid on the merchandise so used or transferred in violation of the bond the regular duties which would apply to such merchandise if imported in its condition at the time of such use or transfer. Such duties shall be paid by the manufacturer, processor, or dealer whose bond is charged with the wool or hair at the time of such use or transfer; but such duties shall not be levied or collected on any merchandise (except white soft wastes, white threads and noils, which shall be dutiable at seven-eighths of such regular duties when used or transferred for use otherwise than in the manufacture of the enumerated articles) resulting in the usual course of manufacture of such enumerated manufactured articles which cannot be used (with or without further preparation) in the usual course of the manufacture of such enumerated articles, or which is exported or destroyed. When any wool or hair which has been entered or withdrawn under bond as provided for in this subparagraph is used or transferred for use, in its imported or any other form, otherwise than in the manufacture of the above-enumerated articles and prior to such use or transfer there shall have been combined or mixed with such wool or hair any other merchandise, the whole or the combination or mixture shall be presumed to be composed of wool or hair entered or withdrawn under bond, as provided for in this subparagraph, unless the manufacturer, processor, or dealer liable for the payment of the duties shall establish the quantity of bonded wool or hair in such combination

or mixture. Every manufacturer, processor, or dealer who has given a bond pursuant to the provisions of this subparagraph shall report any use or transfer of merchandise in violation of the terms of his bond, within thirty days after such use or transfer, to the collector of customs in whose district the bond is filed; and for failure to so report, such manufacturer, processor, or dealer shall be liable to a penalty equal to the value of the merchandise so used or transferred at the time and place of such use or transfer. Such penalty shall be in addition to the duties above provided for. The Secretary of the Treasury is authorized to prescribe such regulations and the form, conditions, and amounts of such bonds as may be necessary to carry into effect the provisions of this subparagraph.

(c) For the purposes of this schedule:

(1) Wools and hair in the grease shall be considered such as are in their natural condition as shorn from the animal, and not cleansed otherwise than by shaking, willowing, or burr picking;

(2) washed wools and hair shall be considered such as have been washed, with water only, on the animal's back or on the skin, and all wool and hair, not scoured, with a higher clean yield than 77 per centum shall be considered as washed;

(3) scoured wools and hair shall be considered such as have been otherwise cleansed (Not including shaking, willowing, burr picking, or carbonizing);

(4) sorted wools or hair, or matchings, shall be wools and hair (other than skirtings) wherein the identity of individual fleeces has been destroyed except that skirted

fleeces shall not be considered sorted wools or hair, or matchings, unless the backs have been removed; and

(5) the Official Standards of the United States for grades of wool as established by the Secretary of Agriculture on June 18, 1926, pursuant to law, shall be the standards for determining the grade of wools. As amended June 25, 1938, 5 p. m. E.S.T., c. 679, § 33 (a), 52 Stat. 1090.